# The Right to Assisted Death

## Looking in All the Wrong Places

## *Abortion Right Is No Support*

**BY YALE KAMISAR**

Eight years ago, I gave a talk at Georgetown University Law Center, noting the growing strength of the "right to die" movement and voicing concern that the culmination of this movement might be the recognition (or discovery) of a constitutional right to assisted suicide and active voluntary euthanasia.

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As I spoke, I couldn't help noticing a lady in a dark blue suit, who was listening quite intently. When the talk ended and the question-and-answer session began, she was the first to raise her hand. She asked me whether I agreed with the result in *Roe v. Wade* (1973), and when I nodded yes she followed up with a couple of questions that went something like this: If you agree that a woman has a right to choose an abortion, why do you reject the right of a person to end her unendurable existence by choosing death? If a woman has a right to invoke the aid of a physician to avoid nine months of pregnancy and the trauma of childbirth, why isn't a sick person suffering great pain and indignity entitled to the active intervention of a physician to promote or to bring about death?

I have only a vague idea of how I responded, but I do remember that I was not satisfied with my answer. Nor, I remember even more clearly, was the lady in blue.

That eight-year-old incident came to mind when I read Judge Stephen Reinhardt's recent opinion for a majority of the U.S. Court of Appeals for the 9th Circuit in *Compassion in Dying v. Washington*, holding that terminally ill, competent adult patients have a due process right to physician-assisted suicide. Early in his opinion, Judge Reinhardt observed:

> We begin with the compelling similarities between right-to-die cases and abortion cases. . . . [B]oth types of cases raise issues of life and death, and both arouse similar religious and moral concerns. Both also present basic questions about an individual's right of choice.

Whether the similarities between the right-to-die cases and the abortion cases are indeed "compelling" is an issue that will probably soon confront the nine Supreme Court justices—one of whom is the lady in blue, Ruth Bader Ginsburg. In the meantime, I venture to say that I find the similarities far from compelling.

I think it misleading to say that both abortion and physician-assisted suicide raise issues of life and death. In *Roe v. Wade*, the Court cleared the way for its ultimate holding by rejecting the argument that a fetus is "a person" within the meaning of the Constitution. As used in the due process clause, the high court told us, "the word 'person' does not include the unborn."

But a terminally ill person, for example, a cancer patient who, despite our best medical efforts, is likely to die in four or five months, is incontestably a "person" or a "human being." Moreover, the mental powers of one seeking to enlist the aid of a doctor in committing suicide cannot be greatly impaired because only a person capable of making a voluntary and informed choice may exercise the right to assisted suicide.

To be sure, many legal scholars have written alternative rationales for the right to choose an abortion and have defended the result reached in *Roe*, even assuming that the fetus is a person. But almost all of these scholars, and others as well, have maintained that the right to an abortion is best grounded on principles of sexual equality rather than due process or privacy. As Harvard Law School's Laurence Tribe has noted:

> Laws restricting abortion so dramatically shape the lives of women, and only of women, that their denial of equality hardly needs elaboration. While men retain the right to sexual and reproductive autonomy, restrictions on abortion deny that autonomy to women. Laws restricting access to abortion thereby

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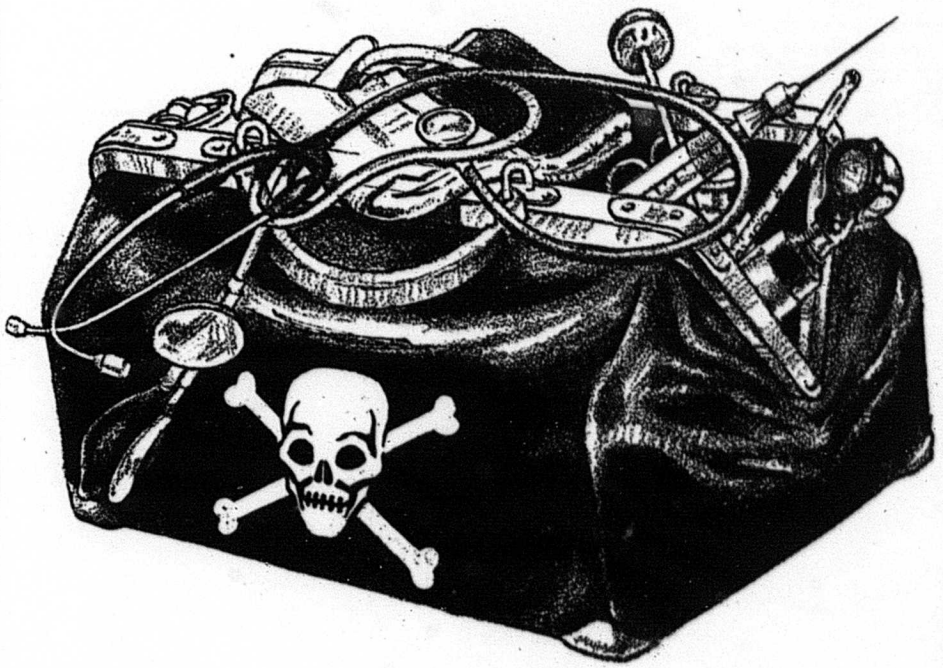

DOUGLAS STANNARD

## *Reliance on Public Opinion Is Misplaced*

**BY MARC SPINDELMAN**

In *Compassion in Dying v. Washington*, a landmark decision nearly certain to be short-lived, the U.S. Court of Appeals for the 9th Circuit *en banc* ruled on March 6 that terminally ill individuals have a constitutionally protected right to commit suicide with a physician's assistance. One of the few things that commentators on both sides of the assisted-suicide debate agree on is that the Supreme Court will likely review the ruling.

The 9th Circuit's opinion, a bookish-length tract written in a magisterial tone, announced—somewhat surprisingly—that the high court's recognition of a woman's right, under certain circumstances, to terminate an unwanted or dangerous pregnancy supports a terminally ill person's right to commit physician-assisted suicide. According to the opinion, written by Circuit Judge Stephen Reinhardt, the federal Constitution protects the right to make decisions that are "highly personal and intimate, as well as of great importance to the individual."

In reaching its conclusion that the Constitution speaks to the right to die, the 9th Circuit relied, in part, on what it believed to be our current societal attitudes toward that right. While no doubt aware that a majority of the states have laws banning assisted suicide, the 9th Circuit reasoned that such laws do not "necessarily indicate societal disapproval" of the banned practice. "That is especially true," added the court, "when such laws are seldom, if ever, enforced."

In theory, one could make the same point about laws prohibiting adultery. But can there be any serious doubt that, even though these laws are less than seldom enforced, adultery is far from warmly embraced by a majority of the population anywhere in the country? Can one earnestly maintain that state laws banning adultery are regarded with disapproval?

### LAWS REFLECT PUBLIC OPINION

The mere fact that a law on the books is not zealously enforced does not mean that society, much less the Constitution, approves of the conduct that the law prohibits. Nor does it "necessarily" reflect, contrary to the 9th Circuit's view, "widespread societal disaffection" with the law itself. No less respected an authority than the Supreme Court has observed that state statutes prohibiting conduct are the best indication, by far, of public attitudes: "First among the objective indicia that

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place a real and substantial burden on women's ability to participate in society as equals. Even a woman who is not pregnant is inevitably affected by her knowledge of the power relationships created by a ban on abortion.

If the abortion cases are really cases about women's equality, as a growing number of commentators believe (including Judge—now Justice—Ginsburg and Dean—now Judge—Guido Calabresi), they do not provide much comfort to proponents of a constitutional right to assisted suicide. The class of individuals who seek physician-assisted suicide is, of course, not defined by sex, nor, as Pennsylvania Law School's Seth Kreimer recently observed, "does it constitute a social group that has been recognized as demanding judicial solicitude. . . It is clear that the effect of the prohibition [against assisted suicide] bears more heavily on the less physically able. [But a] policy that keeps more handicapped than physically able persons alive is, on its face, a doubtful candidate for discrimination on the basis of disability."



### 14TH AMENDMENT LANGUAGE

In the course of reaffirming the controversial *Roe* case in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court spoke at one point about "the right to define one's own concept of existence," and told us that personal decisions relating to marriage, procreation, contraception, child rearing, and the like involve "the most intimate and personal choices a person may make" and that these choices are "central to personal dignity and autonomy" and thus "central to the liberty protected by the Fourteenth Amendment." Viewed in insolation, this language *is* quite sweeping. Literally, it *would* cover the right of terminally ill people to enlist the assistance of another in committing suicide. But literally, it would also cover the right of *any* competent person, terminally ill or not—indeed, physically ill *or not*—to enlist the aid of another in suicide.

One may read the language quoted above narrowly, as I do, limiting it to reproductive rights and related matters, or one may read it quite broadly as granting *every* competent person the right to determine the time and manner of her death. But I fail to see how one can read the language, as many proponents of "aid-in-dying" or "physician-assisted death" do, as conferring a right to assisted suicide only on the terminally ill. Is the choice *whether* to end one's life and *how* to do so "central to the liberty protected by the Fourteenth Amendment," or is it not?

More significant than the capacious language quoted above, is the fact that *Casey* relied heavily on the rule of *stare decisis*. Absent "the most compelling reason to reexamine a watershed decision," the Court told us, overruling *Roe* "under fire" would "subvert the Court's legitimacy beyond any serious question."

To underscore this point, the three controlling justices in *Casey*—Sandra Day O'Connor, Anthony Kennedy, and David Souter (none of whom had been on the Court when *Roe* was decided)—declined to say how they would have voted if they had been members of the Court 20 years earlier. As they saw it, "the immediate question" before the Court in 1992 was not the soundness of the *Roe* decision, "but the precedential force that must be accorded to its holding."

All things considered, I believe the justices who reaffirmed *Roe* were bent on bringing an old constitutional war to an end—not getting ready to fight a new one. ■

# Legislature Should Have the First Word

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reflect the public attitude toward a given sanction, are statutes passed by society's elected representatives."

Nor do public opinion polls, on which the 9th Circuit also relied, necessarily gauge with any unwavering reliability what Americans really think about the right to die. Far more persuasive evidence of the public's view on assisted suicide is the fact that in two of the three states (California and Washington) that have recently sponsored referenda to legalize assisted suicide, the referenda have gone down to defeat. And in the one state in which the referendum ultimately prevailed (Oregon), it prevailed by only a narrow margin. A public vote, it seems to me, trumps a public opinion poll in terms of the evidence it provides about current societal attitudes about death and dying.

But let us assume the 9th Circuit was correct in its claim that a substantial portion of the American public condones assisted suicide. Such a claim does not seem all that implausible; after all, the voters in Oregon did pass the public referendum. Would widespread public support for the right to assisted suicide, as the 9th Circuit evidently believed, lend weight to the claim that courts should find that the Constitution guarantees that right? The answer, I submit, is *no*.

Our federal Constitution places certain decisions that we, as individuals, make beyond the reach of our government. The Supreme Court has told us that marriage, procreation, family relationships, child rearing and education, and abortion are, though nowhere explicitly mentioned in the Constitution, among those decisions that an individual has the right to make, free (for the most part) from state interference. To this list, the 9th Circuit now has added the right of the terminally ill to commit physician-assisted suicide.

Leaving aside the fact that there is no history, and certainly no deeply rooted history, in our country recognizing the right to die, is there any reason to think that it should be the courts, and not the public—through the legislative branch or through a public referendum—that makes the first step to "vindicate" the right? Who, as an initial matter, is better suited to the task of regulating such conduct—the judiciary or the people—if such conduct is to be permitted at all?

If the 9th Circuit is correct that public support for the right to die is widespread, then the courts should stand back and let the democratic process work. Assisted suicide is not illegal in every state, and we now have one state in our country (Oregon) where the practice is expressly permitted by law. There will certainly be time to judge the benefits (or, as some of us think, the costs) of assisted suicide after we have been able to watch how it works in practice. If the day comes when the Supreme Court finds the right to assisted suicide by the terminally ill to be a right of constitutional dimensions, that day is still some time off.

Assisted suicide may be, as the 9th Circuit suggested, an "enlightened" approach to the problems that modern medical science has created—although I, for one, do not think so. But once the courts have ruled, once they have entered the fray and pronounced that the Constitution protects the right to assisted suicide, we will be trapped by our judges' "enlightenment." There will be no turning back. On matters whose consequences are so overwhelmingly final and other-worldly, it is undoubtedly wiser to let the people have at least the first word, if not the last.

*The decision we, as a society, must make about the right to die involves a delicate balance.*

The decision that we, as a society, must make about the right to die is a decision that involves a delicate balance of social values. When courts are called upon to strike such a balance, working with constitutional clay, they must, as Alexander Bickel once noted about the Supreme Court, do so "with an ear to the promptings of the past and an eye strained to a vision of the future much more than with close regard to the present."

The 9th Circuit's recent decision more closely regarded the present than either the future or the past. Hopefully, as other courts weigh in on the issue, they will not make the same mistake. ■